United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1214

To be argued by
PAUL VIZCARRONDO, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1214

UNITED STATES OF AMERICA,
Appellee,

—v.—

ARTHUR MICHAEL STEWART,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States Of America.

PAUL VIZCARRONDO, JR.,
T. BARRY KINGHAM,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Arthur Michael Stewart appeals from a judgment of conviction entered on May 22, 1975, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictment 75 Cr. 206, filed on February 28, 1975, charged Arthur Michael Stewart in two counts with the robbery and armed robbery of the Eastern Savings Bank, 1920 Webster Avenue, Bronx, New York, in violation of Title 18, United States Code, Sections 2113(a) and (d) and 2. Trial commenced on April 28, 1975 and concluded on April 30, 1975, when the jury found the defendant guilty on both counts.

On May 22, 1975, Judge Cooper committed Stewart, pursuant to Title 18, United States Code, Section 4208(b), to the custody of the Attorney General for study, report and recommendations as provided in Title 18, United States Code, Section 4208(c). The commitment was deemed to be for the maximum sentence presecribed by law—a term of imprisonment of forty-five years and a fine of $15,000—unless altered pursuant to Section 4208(b) upon receipt by the Court of the report and recommendations, which were ordered to be submitted within three months. Stewart has not yet been resentenced.

Statement of Facts

The Government's Case

Sergio Rivera testified that he was employed by the Veterans Detective Bureau as an armed guard, and that on February 19, 1975, he was working at the Eastern Savings Bank's drive-in branch at 1920 Webster Avenue, Bronx, New York, where he had been assigned for two years. His duties at the bank were "[t]o guard the place, watch the cars in the parking lot. Whenever they need to take money from one bank to another, to watch it" (Tr. 10-11). Mr. Rivera described the drive-in bank ("the bank") as being in back of the main office of the Eastern Savings Bank, which is located at 420 East Tremont Avenue, Bronx, New York. Behind the bank is a 250-car parking lot that is bounded at its rear by Park Avenue. There are two driveways leading into the parking lot from Webster Avenue, one on each side of the bank, and one driveway on the Park Avenue side of the parking lot (Tr. 11-14). There is one door to the bank, in its rear (Tr. 16).

On the evening of February 19, 1975, Rivera walked out of the bank at a few minutes before seven o'clock to close the gate at the Park Avenue entrance to the parking lot.

When Rivera left the bank, Tyrone Hudson, the only teller working that night, was counting money and preparing to close the bank. At that time of the evening it was dark outside. As Rivera started to close the Park Avenue gate, two men approached him and asked if they could cross the parking lot to Webster Avenue. Rivera said yes, but as he turned to continue closing the gate, one of the men put a gun to his neck, stated it was a hold-up, and told him to raise his hands. Rivera did so, and the man took Rivera's gun from his holster. The men walked Rivera into the parking lot, until one of them told him to lie on the ground, "and don't move your head. If you move your head I'm going to blow it off." Rivera lay face down on the ground for five to ten minutes, until a police officer came and asked if he was all right (Tr. 17-20).

Rivera was not able to identify the defendant as being either of the two men who accosted him that night. He testified, however, that on the previous evening, February 18, 1975, at about 6:55 P.M., he was sitting inside the bank when the defendant walked past one of the windows and grinned at Rivera (Tr. 20-21).

New York City Police Officer George E. Greader testified that on February 19, 1975, he was driving a patrol car occupied also by Sergeant James Mulroy. At approximately 7:00 P.M. the car was thirty to forty feet west of the intersection of Webster and Tremont Avenues, when the officers received a call over the radio that a robbery was in progress at the Eastern Savings Bank. As Greader was turning the car onto Webster Avenue from Tremont Avenue, he observed the defendant about half-way into the driveway next to the bank and walking out towards Webster Avenue. Greader parked the patrol car in back of a bus that was parked in front of the driveway. He left the driver's side of the car, and walked around to the front of the bus. Sergeant Mulroy exited from the passenger side of the car

and walked around the other side of the bus. When Greader reached the front of the bus he confronted Stewart, and saw that Stewart had his right hand in his right coat pocket and was carrying bags in his left hand. Greader, his gun drawn, told Stewart to step back up onto the curb and keep his hand in his pocket. Greader asked him what he had been doing in the driveway to the bank, and Stewart replied he had been "relieving himself." Greader frisked the defendant and felt a gun in his right coat pocket. Greader removed the gun from Stewart's pocket, told him to drop the two bags he was holding in his left hand, and informed him he was under arrest. Sergeant Mulroy then handcuffed Stewart. When Greader picked up the two bags that Stewart had been holding, he also retrieved two rubber gloves that were lying on the ground four to six inches from the bags (Tr. 44-51). The gun that Greader removed from Stewart's pocket was not loaded (Tr. 54). Greader testified that one of the bags contained a large amount of cash, which he counted later that evening and determined to be $20,575 (Tr. 58, 63). The defendant stipulated that the loss to the bank as a result of the robbery was $20,575.

Austin J. Duffy, assistant vice president and manager of the Eastern Savings Bank, testified that the deposits of the bank were insured by the Federal Deposit Insurance Corporation, and identified lists of serial numbers of the bait money that was kept in the bank (Tr. 84, 85-87). The defendant stipulated that all of that bait money was contained among the $20,575 taken from the defendant at the time of his arrest (Tr. 89).

The Defense Case

Tyrone Hudson testified that he was employed as a teller at the bank on February 19, 1975, when at least one man held him up. Hudson did not see the man's face (Tr. 96-97). Hudson testified that he and the guard, Sergio Rivera,

were in the bank when Rivera went outside just before 7:00 P.M. to lock the gates. A man came to the front window of the bank and asked for a one dollar money order, which Hudson sold to him. Hudson then heard a knock at the back door and, thinking it was the guard, opened the door without looking. At least one man entered, placed a gun at the back of Hudson's neck, and said, "Okay, give me the money. I want the money." At gun point, Hudson made several trips carrying cash boxes from the vault to the bathroom, where he emptied the cash boxes. During this seven to nine-minute period, the man who purchased the one dollar money order remained at the front window. When Hudson finished emptying the cashboxes, the robber told him to "step back," and Hudson heard the door slam (Tr. 102-104). Hudson ran out of the bank after the robber or robbers, and saw that the police had a man under arrest in front of the bank. When asked by defense counsel if he saw the person who had been arrested, Hudson answered, "Facially, no. But that's about the best I can say." (Tr. 98) Hudson further testified that he knew Arthur Stewart, that "[w]e grew up together" (Tr. 107).

On cross-examination, Hudson testified that he did not know how many men had entered the bank during the robbery and that there may have been more than one robber (Tr. 125). During the robbery Hudson had been too afraid to look at the gunman (Tr. 126). He also stated that the period of time from when the robber or robbers left the bank to when he saw the man under arrest in front of the bank was probably less than one minute (Tr. 127).

Sergeant James Mulroy * testified that he was riding in a patrol car with Police Officer Greader on February 19,

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* Special Agent Matthew J. Cronin of the Federal Bureau of Investigation, called as a witness by the defendant, testified about interviews he conducted with Sergio Rivera and Luis Anglada after the bank robbery.

1975, when they heard of the bank robbery on the radio. As Greader parked the car behind a bus parked on Webster Avenue, Mulroy saw the defendant, carrying bags in his left hand and with his right hand in his pocket, walking out of the driveway next to the bank. Stewart walked in the direction of the patrol car until Mulroy jumped out of the car, at which time he did an about face and walked around the front of the bus (Tr. 148-151). Mulroy saw Stewart drop the bags when confronted by Greader, but did not see Greader pick up a pair of yellow rubber gloves. Mulroy was with Stewart and Greader approximately one minute after Stewart was arrested (Tr. 157-58). On cross-examination, Mulroy testified that the bags were still on the ground when he left Greader and the defendant (Tr. 162).

The defendant, Arthur Stewart, testified in his own behalf. He admitted having two prior convictions for possession of a hypodermic needle and possession of stolen goods. Stewart claimed that although he lived on West 140th Street in Manhattan, on February 19, 1975 he was in the Bronx on his way to the home of a friend, James Bell, located at 179th Street and Tremont Avenue; that he got off a bus on Webster Avenue and, since he had been to Bell's home only once before and then by cab, asked the bus driver for directions; that he was walking past the front of the bank when he saw two men run out of the driveway and drop bags on the sidewalk; that he picked up the bags and started walking across the street when a police officer stopped him. Stewart admitted telling the officer that he had been in the driveway relieving himself, and testified he told the officer that he had a gun. Stewart denied being in the vicinity of the bank on February 18, 1975, and denied dropping the yellow rubber gloves or ever having them in his possession (Tr. 163-174).

On cross-examination, Stewart testified that he only walked approximately three feet into the driveway to pick

up the bags; that he saw policemen running from the parking lot towards him as he picked up the bags; that he picked up the bags, not knowing what was in them, although he thought the police were running after the two men who had dropped them and it had something to do with the bags. Stewart admitted that he had lied to Officer Greader and that he had not been relieving himself in the driveway. He stated that he did not know that Hudson had worked for the bank. Stewart denied telling agents of the Federal Bureau of Investigation after his arrest that he only saw one man run out of the driveway and drop the bags, and that he saw that man leave the bank, and he claimed that he did not remember telling them that he had arrived in the area of the bank by subway. He admitted telling the agents that he did not want to implicate anyone else because he did not want to be a rat, but asserted it was in response to questions about where had had obtained his gun (Tr. 178-202).

Luis F. Anglada testified that he had been driving on Park Avenue in the Bronx on the evening of February 19, 1975, when he saw two men accost the bank guard at gunpoint. Anglada left his car, ran to a nearby store, and then returned to see a third man standing over the guard, who was on the ground, and the first two men enter the rear door of the bank. The two men subsequently walked out of the bank and toward Webster Avenue, while the third man left the parking lot through the Park Avenue gate. Anglada drove his car to the front of the bank, where for the first time he saw Stewart, under arrest (Tr. 206-209). On cross-examination, Anglada testified that it was dark when he observed these events and that the men in the parking lot were some distance away; that he left the scene for approximately two minutes when he ran to the store, and that when the two men left the bank they were not carrying any bags (Tr. 209-212).

James F. Bell testified * that he lived on Park Avenue between 179th and 180th Streets, and that on February 19, 1975, Stewart was to meet Bell at Bell's home to celebrate Stewart's birthday (Tr. 243-45). On cross-examination, Bell testified that Stewart had been to his home twice before, and that he did not give Stewart directions because Stewart knew how to get there (Tr. 246-47).

The Government's Rebuttal Case

On rebuttal, the Government recalled Officer Greader, who testified that 179th Street and Tremont Avenue do not intersect and are two blocks from each other (Tr. 217). The Government also called FBI Special Agent Danny O. Coulson, who testified about an interview he had with the defendant after his arrest. With the defendant's consent, a written report of that interview was admitted into evidence. The report reads in part as follows:

> "STEWART advised that he resided at 222 West 140th Street, New York, New York, Apartment 7, Telephone Number 927-4690. He advised that he had taken a subway to the Bronx, New York, had arrived in the vicinity of the bank sometime around 7:00 PM and walked through the parking lot of the bank. He advised that he observed an individual leaving the bank wearing a plaid coat, and that this individual dropped two bags. STEWART stated that he walked over observed that one of the bags had a large sum of money in it and picked it up to carry it away. He advised that he was going to keep the money that he had found in the bag.
>
> "STEWART advised at the time of his arrest, he was armed with a 22 caliber, silver, snub-nosed

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* The defendant was permitted to call Bell as a witness on the morning of April 30, before summations. He thus testified after the Government's rebuttal witnesses had testified on April 29.

revolver, which was in his pocket at the time of his arrest. He advised that he had purchased his gun sometime ago, but would not give any details concerning the purchase, or the individual who he purchased it from. STEWART stated that he did not feel he could further discuss his activities because if he told the Federal Bureau of Investigation anything, he would be considered 'rat'. STEWART stated that he always felt that anyone that talked to Law Enforcement Officers, was a 'rat', and that he did not feel that he should say anything further that might implicate other individuals." (GX 12; Tr. 224-226)

Coulson also testified that the defendant had stated that he only saw one man leave the bank, and that he made statements about not wanting to be a rat or implicate anyone else in response to the agent's questions concerning both the robbery and his gun (Tr. 227-28).

ARGUMENT

POINT I

The Court properly refused to instruct the jury on collusion as a defense.

Stewart contends that the trial court erred in refusing a defense request to instruct the jury that collusion between Stewart and Tyrone Hudson, the bank teller, would be a "defense." This requested instruction was properly denied because it was not supported by the evidence and because it was incorrect as a matter of law. "If a proffered request is in any respect incorrect, the denial of such a request is not error." *United States* v. *Kelly,* 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966). See *United States* v. *Deaton,* 468 F.2d 541, 545 (5th Cir. 1972), *cert.*

denied, 414 U.S. 840 (1973); *United States* v. *Fellabaum,* 408 F.2d 220, 228 (7th Cir.), *cert. denied,* 396 U.S. 818 (1969); *Stewart* v. *United States,* 395 F.2d 484, 491 (8th Cir. 1968). The possibility of collusion between Stewart and a bank employee does not take the offense out of Sections 2113(a) and (d), and even if the jury had found such collusion, the undisputed evidence that the bank security guard, Sergio Rivera, was accosted, satisfies the elements of the crimes charged.

On the morning of the Court's charge, defense counsel made two oral* requests to charge, one of which was that "if you find that the defendant and the bank employee were in agreement to steal and embezzle federal funds, then you cannot convict the defendant of these charges" (Tr. 239). Judge Cooper properly denied the request.

After the Court's charge, defense counsel renewed and expanded his objection:

> ". . . I will again point out to the Court that the Government's request number 2, which was incor-

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* Failure to submit a request to charge in writing, prior to the judge's charge, is in and of itself a ground for denying the request. *United States* v. *Gonzalez-Carta,* 419 F.2d 548, 552 (2d Cir. 1969); *cf. United States* v. *Kahaner,* 317 F.2d 459, 477 (2d Cir.), *cert. denied,* 375 U.S. 835 (1963). Judge Cooper recognized the difficult situation which Stewart created by waiting until the last minute to submit oral requests to charge:

> "Well, one of the big troubles with this last minute request to charge—and I have seen many unwarranted holocausts caused as a result of it and I try desperately to avoid it—is that here we have a situation where I repeatedly asked, what do you want the judge to charge? Let's have it in ample time so as to discuss it and to deal with the request coolly and dispassionately. The jury is here. They were told to be here at 9:30. I'm keeping them waiting really while we try to undertake what is the right thing to do here. We will have to do the best we can" (Tr. 241-42).

porated in your charge, was that the money was taken from the persons or presence of a person, namely an employee or teller of the bank, in this case the teller, Tyrone Hudson. It must have been taken from Tyrone Hudson by use of force, violence and intimidation.

"I put in a request yesterday that if they felt that Mr. Hudson was a collaborator in the purloining of money from the bank, then certainly the defendant cannot be found guilty of taking the money from Mr. Hudson.

"Mr. Hudson is the only person here who was an employee of the bank. Mr. Rivera, as I recall, is an employee of a private guard service guarding the parking lot, and therefore my request yesterday I should certainly reiterate today in line with what you told the jury as far as Mr. Hudson is concerned" (Tr. 337-38).

Judge Cooper denied the exception.

The trial court properly refused to give the requested instructions. First, a defendant is entitled to have his theory of the case submitted to the jury *only* where the theory is supported by the evidence. *United States* v. *Blair*, 456 F.2d 514, 520 (3rd Cir. 1972); *United States* v. *Cullen*, 454 F.2d 386, 390 (7th Cir. 1971); *United States* v. *Garcia*, 452 F.2d 419, 423 (5th Cir. 1971); *Devine* v. *United States*, 403 F.2d 93, 95 (10th Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969). Here, Stewart called Hudson as his own witness to establish the teller's inability to identify the defendant as the robber. On cross-examination the Government established that fear kept Hudson from looking at his assailant (Tr. 126). Moreover, Stewart's defense was that he had not robbed the bank, and indeed he testified that he had not known Hudson was working at the bank

(Tr. 187). The unsupported suggestion of collusion was a repudiation of Stewart's own testimony, and is wholly unsupported by the facts of record.

In addition, the requested charge was incorrect as a matter of law. While it is not completely clear either from the record below or from Stewart's brief on appeal, Stewart appears to argue that if the jury found that he had collaborated with Hudson, the bank teller, he would be guilty of aiding and abetting a bank embezzlement but not of violating Sections 2113(a) and (d). While such collusion may well constitute bank embezzlement under Title 18, United States Code, Section 656, it does not preclude a bank robbery conviction under Sections 2113(a) and (d). Section 2113(b), the federal bank larceny statute, covers embezzlement by a bank employee. *United States* v. *Fistel*, 460 F.2d 157, 162-63 (2d Cir. 1972); *United States* v. *Pruitt*, 446 F.2d 513 (6th Cir. 1971). Section 2113(b) is a lesser included offense within Sections 2113(a) and (d). *See Prince* v. *United States*, 352 U.S. 322 (1957); *Gorman* v. *United States*, 456 F.2d 1258 (2d Cir. 1972). Therefore a violation of section 2113(b)—in this case bank embezzlement—is a violation of Sections 2113(a) and (d) when the aggravating elements required by those statutes are proven. *See United States* v. *Rollins*, 383 F. Supp. 494, 495 (S.D.N.Y. 1974). Moreover, as this Court recognized in *Fistel*, acts which are violations of Section 656 may also be violations of a subsection of Section 2113 when the acts satisfy the elements of that subsection. Thus, even if the jury had found collusion between Stewart and the bank teller, Stewart still could have been found guilty of bank robbery under Sections 2113(a) and (d) if the jury had found—as it did—that the Government had proven the elements of those crimes beyond a reasonable doubt.

Stewart also seems to argue that had the jury found collusion between him and Hudson, one or more of the elements

of the crime of bank robbery would not have been established (Br. 6). Apparently, Stewart claims that this failure of proof is the effect of the Court's refusal to instruct on collusion as "defense." This argument, however, ignores the uncontradicted evidence that in order to accomplish their goal unimpeded, the bank robbers intimidated and assaulted the guard, Sergio Rivera. The jury therefore was not required to acquit Stewart if it found that Hudson was not personally intimidated or assaulted. There is also no dispute that the money was "taken" from the bank without the bank's consent, *see Smith* v. *United States*, 291 F.2d 220 (9th Cir.), *cert. denied*, 368 U.S. 834 (1961), or that the money was taken from the person or presence of Hudson.*

Accordingly, the trial court was not required to submit the collusion "defense" to the jury, and Judge Cooper properly refused the defense-requested instruction.

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* There is no requirement, in either the statute or the case law, that force, violence or intimidation must be used on the person from whose immediate presence the money is taken. The sensible construction of the statute, viewing the evil at which it is directed, is that it must only be shown that force, violence or intimidation were used to accomplish the taking, which encompasses the accosting of Rivera. *Cf. United States* v. *Howard*, 506 F.2d 1131, 1133 (2d Cir. 1974) (the elements of Section 2113(a) include that "the taking was accomplished through the use of force and violence or by intimidation, *and* from the person or presence of individuals other than defendants. . . .)" (emphasis added). In addition, the taking here was from Rivera's presence as well as Hudson's. Rivera was accosted on bank grounds and was guarded by at least one of the robbers throughout the robbery. This is similar to the not uncommon situation where several robbers enter a bank and, while some of them hold the bank employees and customers at gun point, others enter the bank's vault and remove the money. That is a situation that Section 2113(a) was clearly intended to cover. *Cf.*, H. Rep. No. 1461 at p. 2 (73rd Cong., 2d Sess., May 3, 1934); S. Rep. No. 537 (73rd Cong., 2d Sess., March 20, 1934). The result should be no different here merely because Rivera was held at bay outside the bank but on bank grounds, rather than inside the bank.

POINT II

The trial court's charge on aiding and abetting was correct.

Stewart argues that the trial court erred in refusing "to charge that something more must be shown to connect appellant to the rest of the gang than his mere presence and possession of the money. . . ." The District Court fully and adequately instructed the jury on the law of aiding and abetting (Tr. 314-16). *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949); *United States* v. *Umans*, 368 F.2d 725, 728 (2d Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). These instructions included the following:

> "Of course, to find the defendant guilty of aiding and abetting you must find something more than mere knowledge on his part that a crime was being committed for a mere spectator at a crime is not a participant. . . ." (Tr. 315)

The charge as a whole properly instructed the jury on the elements of aiding and abetting. See *United States* v. *Wright*, 459 F.2d 65, 66-67 (8th Cir. 1972). Furthermore, Stewart did not submit a request to charge on aiding and abetting, and he did not object to the trial court's instructions on aiding and abetting.* See *United States* v. *Wright*,

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* Indeed, at the conference held to discuss the parties' requests to charge, defense counsel stated, in reference to the Government's request on aiding and abetting (which was substantially granted):

> "I don't feel there is any evidence of aiding and abetting. However, if the Government's claim is aiding and abetting, this is a correct recitation of the law on aiding and abetting" (Tr. 233).

supra at 67; *United States* v. *Leach*, 427 F.2d 1107, 1113 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970); *Clark* v. *United States*, 405 F.2d 166 (5th Cir. 1968); *United States* v. *Caci*, 401 F.2d 664, 669-70 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1966); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

POINT III

There were no contradictions or ambiguities in the District Court's charge that require reversal.

Stewart claims that the District Court's charge to the jury contained certain contradictions and ambiguities that require the reversal of his conviction. Except for the Court's reference to Agent Coulson's testimony, none of these claimed errors in the charge were objected to below, and Stewart is therefore precluded from raising those claims on appeal. Fed.R.Crim.P. 30; *see, e.g., United States* v. *Leach*, 427 F.2d 1107, 1113 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970); *Clark* v. *United States*, 405 F.2d 166 (5th Cir. 1968); *United States* v. *Caci*, 401 F.2d 664, 669-70 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1966); *Terlikowski* v. *United States*, 379 F.2d 501, 511 (8th Cir.), *cert. denied*, 389 U.S. 1008 (1967); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Furthermore, each of Stewart's claims is meritless.

First, Stewart contends that Judge Cooper erred in discussing Count Two of the indictment, which charged a violation of Section 2113(d), by stating to the jury that it "must first find beyond a reasonable doubt that [Stewart] committed the crime charged in Count One [a violation of Section 2113(a)]" (Tr. 334). The court later instructed the jury, however, that "should you find the defendant either guilty or not guilty of one count, it does not automatically mean that you should find the defendant guilty

or not guilty on the other count of the indictment" (Tr. 334). In any event, the Court's earlier instruction was correct, if not favorable to Stewart, since by its terms an element of Section 2113(d) is the commission or attempt to commit "any offense defined in subsections (a) and (b)."

Stewart also claims error because, in discussing the elements of Count One of the indictment, the trial court stated, "Now, let's go to the fourth element, because I don't think that you will have too much difficulties with the first three" (Tr. 305). Judge Cooper immediately followed this, however, by saying, "I don't need to have expansion on those first three elements that I mentioned outside of saying to you that each must be established beyond a reasonable doubt." Moreover, the statement was immediately preceeded by the following:

> "As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence whatever" (Tr. 304-05).

The trial court's instructions were clear: the first three elements of Count One required no further elaboration or definition by the Court, but the Government had to prove those elements beyond a reasonable doubt. The instructions were not contradictory or in any way erroneous.

Stewart complains of the trial court's use of Agent Coulson's testimony as an example in instructing the jury on their determination of the credibilty of witnesses. Judge Cooper explicitly stated that he was referring to Coulson's testimony "[j]ust by way of illustration," (Tr. 329) and also instructed the jury at that point and elsewhere * that

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* For example, shortly before the reference to Coulson's testimony, the Court stated:

[Footnote continued on following page]

it was their responsibility alone to evaluate the testimony of Coulson and other witnesses:

> "What is your estimate of [Coulson's] motive? And following that, the total weight to be given his testimony. Apply that test as well as any others that appeal to your common sense to each witness" (Tr. 330).

In *Quercia* v. *United States*, 289 U.S. 466, 469 (1933), the Supreme Court explained the latitude which the trial Court may exercise in this area:

> "In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination."

See United States v. *Projansky*, 465 F.2d 123, 136 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972). "This assistance to the jury may include a general appraisal of the credibility of witnesses, or the singling out of a specific witness." *United States* v. *Carlos*, 478 F.2d 377, 379 (9th Cir. 1973). *See also United States* v. *Bujese*, 378 F.2d 719, 721 (2d Cir. 1967), *vacated and remanded on other grounds*, 392 U.S. 269 (1968). Judge Cooper's reference to Coulson's testimony was proper and well within his discretion.

Stewart contends that it was error for the trial court to state that "[t]here has been no contest with regard to the

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"That's where your strength comes in because it is your evaluation, not mine, not counsels', but your estimate of the testimony given by the witnesses, and each of the witnesses that is controlling" (Tr. 326).

contention that a robbery took place that day at that bank." As previously pointed out, Stewart did not object at trial to that statement. Moreover, even under Stewart's theory that he and Hudson were in collusion, there was still a robbery or taking of the bank's money, within Section 2113(a). *See* Point I, *supra*. Appellant's claim of error and prejudice, made for the first time on appeal, is frivolous.

Finally, Stewart claims that the District Court incorrectly instructed the jury as to the meaning of "in jeopardy" as it appears in section 2113(d). The Court's charge on this point is as follows:

> "To justify such a finding in this case you must be convinced beyond a reasonable doubt that the alleged robbers carried one or more firearms which were drawn and loaded. It is not essential to such a finding that there be direct evidence that shows the firearm was in fact loaded.
>
> "If a person is engaged in a robbery and displays or points a gun to insure his demand and intends to produce a fear in a person or persons, the jury is permitted to infer from such facts that the gun was loaded and capable of inflicting the bodily injury threatened by the one who employed it." (Tr. 310-11).

These instructions correctly stated the law. *See United States* v. *Marx*, 485 F.2d 1179, 1184-85 (10th Cir. 1973), *cert. denied*, 416 U.S. 986 (1974); *United States* v. *Shelton*, 465 F.2d 361 (4th Cir. 1972); *United States* v. *Roustio*, 455 F.2d 366, 371-72 (7th Cir. 1972); *United States* v. *Marshall*, 427 F.2d 434, 436-38 (2d Cir. 1970).

POINT IV

Sergio Rivera, the bank guard, is a "person" within the meaning of Section 2113(a).

Stewart argues that if Sergio Rivera, the bank guard employed by the Veterans Detective Bureau and assigned to the Eastern Savings Bank at the time of the robbery, "were a general employee guarding the parking lot whose duties were not specifically to guard the bank," then Rivera is not a person within Section 2113(a)'s requirement that the taking be "from the person or presence of another." The premise upon which Stewart's argument is based is incorrect because Rivera was responsible for guarding the bank (Tr. 11).

Moreover, the statute only requires that the taking be "from the person or presence of another," not from a bank employee. Where Congress has intended as an element of a crime that a person be a bank employee, it has so stated explicitly. *See, e.g.* 18 U.S.C. § 656. In *United States* v. *Marx*, 485 F.2d 1179 (8th Cir. 1973), *cert. denied*, 416 U.S. 986 (1974), relied on by appellant, the court determined that the defendants had robbed the bank, rather than a bank officer personally. The significance of the issue was that if they had robbed the bank official personally the taking would not have been of "property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank," as required by Section 2113(a). Here, there is no question that Stewart took money that belonged to the bank.

POINT V

The Government did not fail to meet its obligations under *Brady* v. *Maryland*.

Stewart contends that the Government failed to meet its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), because it did not disclose to him the substance of the testimony given by two witnesses called by him at trial, Tyrone Hudson and Luis Anglada.

Prior to trial, the Government gave Stewart's counsel the following letter (Court Exhibit 5; Tr. 115):

> This is to inform you that Sergio Rivera, Luis Anglada and Tyrone Hudson were witnesses to the February 19, 1975 robbery of the Eastern Savings Bank, 1926 Webster Avenue, Bronx, New York, and that none of the three men can identify the defendant, Arthur Michael Stewart, as a participant in the bank robbery. Mr. Rivera, Mr. Anglada and Mr. Hudson will be in the United States Attorney's Office on Monday, April 28, 1975, and will be available for you to interview if you wish.

Stewart did not interview the witnesses as offered by the Government (Tr. 139-40).

A fundamental element of the *Brady* doctrine is the "favorable character for the defense" of the evidence allegedly suppressed by the Government. *Moore* v. *Illinois*, 408 U.S. 786, 794-95 (1972).

> "The purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evi-

dence known to the government but unknown to him." *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

The above-quoted letter stated the extent of the Government's knowledge of any testimony that Hudson or Anglada could give that was favorable to appellant: that both men were witnesses to the robbery and neither could identify Stewart as a participant. Stewart points to no other aspect of Hudson's or Anglada's testimony that in any way exculpates him. Hudson's testimony that he had known Stewart all his life, rather than being favorable to Stewart, was additional evidence of his connection to the bank. Furthermore, the Government made Hudson and Anglada available to Stewart for him to interview before the trial, but he failed to take advantage of this offer. *See United States* v. *Ruggiero*, *supra* at 604-05. The Government fully complied with its responsibilities under *Brady*.

Stewart also argues that the Government was required to give him Hudson's statements in its possession when he asked for them at trial. Neither Title 18, United States Code, Section 3500 nor any other authority requires the Government to give a defendant such material for his own witness other than evidence that comes within *Brady*.*

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* All of Hudon's statements were given to the trial court for *in camera* inspection to determine if they contained *Brady* material, and Judge Cooper correctly ruled they did not (Tr. 110-14, 136-37). *See United States* v. *Ruggiero*, *supra* at 604; *United States* v. *Jordan*, 399 F.2d 610, 615 (2d Cir.), *cert. denied*, 393 U.S. 1005 (1968).

POINT VI

The trial court's instruction to the jury on possession of recently stolen property was correct.

The trial court instructed the jury on possession of recently stolen property as follows:

> "Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen. So says the law. The law goes on and says, 'And possession of property recently stolen, if not satisfactorily explained, is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, *in the light of surrounding circumstances shown by the evidence in the case,* that the person in possession not only knows it was stolen property but also participated in some way in the theft of the property.' Ordinarily the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property.
>
> *"It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession of recently stolen property.*
>
> *"Of course, if any possession the accused may have had of recently stolen property is consistent with innocence, or if you entertain reasonable doubt of guilt, you must acquit the accused.*
>
> "Let me go further and put it another way. Possession of the fruits of crime recently after its

> commission says the law, justifies the inference that possession is guilty possession, and though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. It is for you the jury to decide whether a defendant's explanation of his possession of recently stolen property is to be believed, and whether this explanation overcomes the permissible inference of guilt from the fact of possession of recently stolen property" (Tr. 311-12, emphasis added).

This instruction is a correct statement of the law. *Barnes* v. *United States*, 412 U.S. 837 (1973); *United States* v. *Jenkins*, 496 F.2d 57, 67 (2d Cir. 1974); *United States* v. *Davis*, 487 F.2d 112, 119-20 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States* v. *Plemons*, 455 F.2d 243, 246 (10th Cir. 1972); *United States* v. *Lefkowitz*, 284 F.2d 310, 313 (2d Cir. 1960).

In *United States* v. *Jones*, 418 F.2d 818 (8th Cir. 1969), relied upon by Stewart, the Court held the evidence insufficient to sustain the defendant's conviction under Section 2113(d) because the only evidence presented that connected him with the bank robbery was his possession of some of the stolen money the day after the robbery. The evidence of Stewart's participation in the bank robbery charged here is far greater, and included: his possession of all the stolen money immediately outside the bank within minutes—if not less than one minute—after the robbery; his possession of a gun at the time of his arrest; the retrieval by Officer Greader of a pair of rubber gloves within inches of where Stewart dropped the bags with the stolen money; the false exculpatory statements that Stewart made after his arrest, and the inconsistencies between his post-arrest statements and his testimony at trial; the testimony by Rivera that Stewart had looked into the bank's window on the evening before the robbery. Obviously, the Court's

charge on possession of recently stolen property, which required consideration of all of those circumstances, was eminently correct. *Barnes* v. *United States, supra.*

POINT VII

The trial court did not err in admitting into evidence the rubber gloves.

Stewart claims it was error for Judge Cooper to admit into evidence the pair of rubber gloves that Officer Greader retrieved four to six inches from where Stewart dropped the bags containing the stolen money. There was no error.

"A trial judge is given broad discretion in balancing the probative value of eivdence against its possible prejudicial effect." *United States* v. *Higgins,* 458 F.2d 461, 467 (3rd Cir. 1972); *see United States* v. *Dono,* 428 F.2d 204, 208 (2d Cir.), *cert. denied,* 400 U.S. 829 (1970). The rubber gloves were items with which a bank robbery could be accomplished and therefore had probative value with regard to the crimes charged. *United States* v. *Goad,* 426 F.2d 86, 88-89 (10th Cir. 1970); *see also United States* v. *Amaral,* 488 F.2d 1148, 1151 (9th Cir. 1973); *United States* v. *Eustace,* 423 F.2d 569, 571 (2d Cir. 1970); *United States* v. *Ravich,* 421 F.2d 1196, 1203-05 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970). Furthermore, the gloves were not inadmissible, as Stewart suggests, because they were found near him rather than on his person. *See United States* v. *DeLarosa,* 450 F.2d 1057, 1068 (3rd Cir. 1971), *cert. denied,* 405 U.S. 927 (1972); *see also United States* v. *Eustace,* 423 F.2d 569, 571 (2d Cir. 1970). The jury thus was properly permitted to infer that Stewart had possessed the gloves and that he had used them during the bank robbery.* The trial court did not abuse its discretion in admitting the gloves.

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* An inference may be based upon another inference. *United States* v. *Eustace,* 423 F.2d 569, 571 (2d Cir. 1970); *United States* v. *Ravcih,* 421 F.2d 1196, 1204 n. 10 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for the United States
Of America.

PAUL VIZCARRONDO, JR.,
T. BARRY KINGHAM,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Paul Vizcarrondo, Jr., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28th day of September, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Joseph I. Stone, Esq.
277 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Paul Vizcarrondo, Jr.

Sworn to before me this
28th day of August, 1975

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500037
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977